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49. (Amended) The massaging apparatus of claim 48 wherein (the radiant heat is characterized in that it substantially passes through skin) human body

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51. (Amended) A method for reducing affects on appearance of a region of a person's skin resulting from cellulite deposits underlying the region comprising:

illuminating the skin region with radiant heat that penetrates the skin and heats the underlying cellulite;

rolling rotatable massaging elements over the region while illuminating the region with said radiant heat to mechanically manipulate the region and the underlying cellulite; and

sucking the region and underlying cellulite with a vacuum while illuminating the region with said radiant heat.

#### REMARKS

Claims 48-52 are pending. The Examiner has determined that the claims are subject to a restriction requirement in that claims 48-50 are drawn to a first invention that is distinct from a second invention to which claims 51 and 52 are drawn. The Examiner has constructively elected claims 48-50 for examination and withdrawn claims 51 and 52 under 37 CFR §1.142(b) and MPEP § 821.03. Claims 48, 49 and 51 are amended. A marked-up version of the amended claims showing the amendments made is attached hereto.

Applicants provisionally elect claims 48-50 for examination and request reconsideration of the restriction requirement in view of the amendments to claim 51 and the discussion thereof below.

Claims 48-50 stand rejected under 35 U.S.C. §112 second paragraph. Claim 48 is rejected as being indefinite for lack of clarity as to whether or not "housing" is part of the invention, for appearing to claim a part of human anatomy and for lack of clarity in defining the structural relationship between the apparatus and the radiant heat source. Claim 49 is rejected as being indefinite because it appears to claim human anatomy. Applicants submit that the amendments to claims 48 and 49 make explicit what is implicit in the un-amended claims and corrects for any lack of clarity in the un-amended claims.

The examiner does not provide reasons for rejecting claim 50 under U.S.C. §112 paragraph 2. Applicants assume that any reason that might provide a basis for the rejection is removed by the amendments to claims 48 and 49.

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Claims 48-50 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Bleeker et al. (US 6,017,320) in view of Chang (US 5,336,159). The rejection was anticipated and addressed in applicants' response to the first office action. In that response applicants pointed out that neither Bleeker nor Chang, nor any of the other prior art cited by the Examiner, suggests or indicates in any manner a desirability of combining heat, vacuum and massage elements in a massage device. It was therefore pointed out that "prior art cited by the Examiner does not, in harmony with MPEP 2141, "Basic Considerations which Apply to Obviousness Rejections", support a prima facie obviousness rejection of claim 48."

In the present final office action the Examiner states that applicants' arguments put forth in the first response are not "persuasive" and states that "a person of ordinary skill in the art could have readily appreciated that Bleeker's massaging device could ~~be~~ included a radiant heat source in view of Chang." (Corrections by crossing out added.)

Applicants respectfully traverse the Examiner's finding of non-persuasiveness. Chang describes a massager for using infrared radiant heat for "stimulating the muscles and joints" (column 1 lines 23-24, column 2 lines 29-32). Bleeker on the other hand describes a massager for treating the skin and in particular for using a vacuum to treat the skin by forming folds in the skin (column 1 lines 28-29 as referred to in the summary of the invention column 2 lines 23-24 and in claim 1 column 145 line 3). Chang's massager and Bleeker's massager are intended for different treatments and respectively teach use of radiant heat and vacuum for different purposes. It would therefore not be obvious and "readily appreciated" to combine radiant heat and vacuum in a device that treats the skin or a device that treats the muscles and joints.

With respect to the Examiner's remarks in section 9 regarding a requirement of a structural difference between the claimed invention and the prior art in order for the claimed invention to be patentable, applicants submit that amended claim 48 clarifies the structural relationship between the radiant heat source and the apparatus and clarifies thereby such a structural difference.

Claim 51 is amended to recite that "rolling rotatable massaging elements" and "sucking ... with a vacuum" are performed "while illuminating the region with said radiant heat" and makes express what is implicit in the un-amended claim. The application of "rolling and vacuum" while massaging is supported in the text on page 5 lines 28-32. The method defined by claim 51 comprising application of rolling and vacuum while massaging cannot practically be performed by separate apparatus as suggested by the Examiner. Unless functions provided by features that make the apparatus defined by claim 48 patentable are deleted, the apparatus


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performs the method defined by claim 51. Applicants therefore submit that the inventions of claims 48 and 51 are not distinct and that claims 48-52 should not be subject to restriction.

In view of the above remarks applicants request the Examiner to reconsider the rejection of claims 48-50 and the restriction requirement.

An action on the merits is respectfully awaited.

Respectfully submitted,  
M. KOCHMAN, et al.

  
Maier Fenster  
Reg. No. 41,016

February 7, 2002  
Roy N. Envall, Jr.  
c/o Anthony Castorina  
2001 Jefferson Davis Highway, Suite 207  
Arlington, VA 22202

Tel: (703) 415-1581

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### MARKED UP CLAIMS

48. (Amended) A massaging apparatus for reducing effects of cellulite on appearance of a region of a person's skin comprising:

a housing;

at least one massaging element rotatable within thea housing, and extending from the housing so that the at least one massaging element is positioned to manipulate thea region ~~of the person's skin~~ and underlying cellulite tissue when the apparatus is applied to the region;

a vacuum pump that generates a low pressure region within the housing, said low pressure region being operative to draw which low pressure region draws the region of skin and underlying cellulite towards the housing; when the apparatus is applied to the region; and

a radiant heat source mounted to the housing that provides radiant heat operative to for applying heat to the cellulite tissue when the apparatus is applied to the region.

49. (Amended) The massaging apparatus of claim 48 wherein the radiant heat ~~source provides heat is characterized in that it~~ that substantially passes through the skin, and heats the cellulite.

51. (Amended) A method for reducing affects on appearance of a region of a person's skin resulting from cellulite deposits underlying the region comprising:

illuminating the skin region with radiant heat that penetrates the skin and heats the underlying cellulite;

rolling rotatable massaging elements over the region while illuminating the region with said radiant heat to mechanically manipulate the region and the underlying cellulite; and

sucking the region and underlying cellulite with a vacuum while illuminating the region with said radiant heat.